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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	Case #08-cr-1169
)	
Plaintiff,	)	NOTICE OF MOTION FOR
	)	RETURN OF PROPERTY
VS.)	
)	
	)	DATE: JUNE 2, 2008
MIGUEL MENDIOLA-MARTINEZ,	)	TIME: 2:00 P.M.
	)	DEPT. 4, HON. W.Q. HAYES
Defendant,)	
)	

To: UNITED STATES OF AMERICA, PLAINTIFF; CHRISTINA MCCALL, ASSISTANT UNITED STATES ATTORNEY.

PLEASE TAKE NOTICE that on June 2, 2008 at 2:00 p.m. or as soon thereafter as the court convenes in the courtroom of Honorable William Q. Hayes, Judge, counsel for the defendant, Genaro Lara and L. Marcel Stewart, will move the Court for entry of an order for return of defendant's personal property pursuant to Federal Rules of Criminal Procedure, 41(e).

This motion is based on the instant notice of motion, motion, memorandum of points and authorities filed herewith, all other applicable constitutional, statutory, and case authority, and such evidence and argument as may be presented at the hearing of this motion.

Respectfully Submitted,

Genaro Lara, for Miguel Mendiola-Martinez

Dated; May 12, 2008

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Attorney for Miguel Mendiola Martinez

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	Case # 08-cr-1169
)	
Plaintiff,	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES IN SUPPORT OF
VS.	)	MOTION FOR RETURN OF
	)	PROPERTY.
MIGUEL MENDIOLA MARTINEZ,)	
)	
Defendant.)	

INTRODUCTION

Defendant, Miguel Mendiola-Martinez, by and through his retained counsel of record, Genaro Lara and L. Marcel Steward, hereby move pursuant to Fed.R.Crim.P. 41(e) for return of all personal property seized by special BTF agents on March 17, 2008. On that date, SA Beals and SA Michael Willever conducted an interview of Miguel Mendiola-Martinez at his residence. Miguel Mendiola-Martinez showed five firearms in his possession. The firearms seized by the arresting officers are described as follows:

1. Ruger, model Vaquero, .45 caliber, revolver, serial number 58-29096,
2. Colt, model Commander, .45 caliber, pistol, serial number CJ27643
3. Remington, model 700, 30-06 caliber, bolt action rifle, serial number B6264511
4. Winchester, model 70, 300 WIN MAG caliber, bolt-action rifle, serial number G312564
5. Remington, model 700, .270 caliber, bolt-action rifle, serial number E6743201.

The United States Attorney's Office has not indicated whether the seized property is

1 evidence that must be retained for use in this case. However, it is plausible that the government
2 could make that argument in a bid to retain the property. If that is the case, the defendant will
3 stipulate that photocopies will suffice to fairly represent the seized items without the need to
4 have the items physically present in trial. Defendant will further stipulate as to authenticity of the
5 pictures for evidentiary purposes, thereby relieving the government of the need to keep the
6 seized items. Such firearms were in the legal possession of the defendant at the time of his
7 arrest. He was also in possession of a valid hunter's license issued by the State of California in
8 the name of the applicant, defendant herein. He obtained such license as a person with lawful
9 authority to be in the United States pursuant to a lawfully issued work permit issued to the
10 defendant under his own name. These two documents form the legal foundation and basis to
11 defeat the government's position that Mr. Miguel Mendiola-Martinez was present in the United
12 States as an "illegal alien". This motion addresses the issue of the return of the personal
13 property. Defendant will address the legal issues arising from the questionable indictment at the
14 proper forum at the right time and manner.

15 ARGUMENT

16 THERE IS NO VALID REASON FOR RETENTION BY THE GOVERNMENT OF THE
17 SEIZED ASSETS.

18 Fed.R.Crim.P. 41(e) provides in pertinent part:

19 A person aggrieved by an unlawful search and seizure or by the deprivation of property
20 may move the district court for the district in which the property was seized for the return of the
21 property on the ground that such person is entitled to lawful possession of the property. The
22 court shall receive evidence on any issue of fact necessary to the decision of the motion. If the
23 motion is granted, the property shall be returned to the movant, although reasonable conditions
24 may be imposed to protect access and use of the property in subsequent proceedings.

25
26 In this case, there is no legitimate bases for the government's retention of the property seized
27 from Mr. Miguel Mendiola-Martinez. The firearms were legitimate property in lawful possession
28

1 by the accused. He applied for and was granted a hunting license as a lawful resident entitled to
2 work and live in the United States pursuant to a work permit. In *United States v. Ortega*, (1978)
3 450 F.Supp.211, defendant moved for return of cash seized from his briefcase at the time of his
4 arrest. Defendant admitted that part of the cash seized had been the product of drug sales.

5 With respect to the threshold issue of jurisdiction, the *Ortega* court found that it had
6 jurisdiction over the motion for return of property because the issue was “ancillary” to the
7 criminal proceeding.

8 Thus, this Court has the authority to order the government to return the listed items to Mr.
9 Miguel Mendiola-Martinez. Rule 41(e) is clear on its face: the government cannot keep the
10 property if the accused is entitled to its return. If the government argues the seized property will
11 be relevant and admissible evidence for the government’s case, then Rule 41(e) calls for
12 “reasonable conditions to be imposed to protect access and use of the property in future
13 proceedings. Here, Mr. Miguel Mendiola-Martinez will stipulate to the government’s use at trial
14 of photocopies of the seized items. Therefore there is no just reason that the property seized by
15 the special agents should not be returned to Mr. Miguel Mendiola-Martinez or to his designated
16 agent.

17 Conclusion

18 For the foregoing reasons, defendant, Miguel Mendiola-Martinez respectfully prays for an order
19 of Court directing the government to return his property.
20

21 Dated: May 12, 2008

22
23 Respectfully Submitted,

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26 Genaro Lara, Attorney for Miguel Mendiola-Martinez
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